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SUPREME COURT OF THE UNITED STATES

No. [redacted] ORIGINAL, OCTOBER TERM, 1928.

THE STATE OF COLORADO, COMPLAINANT,

VS.

THE STATE OF KANSAS AND THE FINNEY COUNTY WATER USERS' ASSOCIATION, A CORPORATION, DEFENDANTS.

SEPARATE ANSWER OF THE DEFENDANT, THE FINNEY COUNTY WATER USERS' ASSOCIATION.

F. DUMONT SMITH,
LAWRENCE LEWIS,
CHESTER I. LONG,
Solicitors for The Finney County Water Users' Association, a Corporation.

SUPREME COURT OF THE UNITED STATES

No. 14 ORIGINAL, OCTOBER TERM, 1928.

THE STATE OF COLORADO, COMPLAINANT,

VS.

THE STATE OF KANSAS AND THE FINNEY COUNTY WATER USERS' ASSOCIATION, A CORPORATION, DEFENDANTS.

SEPARATE ANSWER OF THE DEFENDANT, THE FINNEY COUNTY WATER USERS' ASSOCIATION.

Comes now the defendant The Finney County Water Users Association and by leave of Court files this its separate answer to the Bill of Complaint filed herein by the State of Colorado, and respectfully says:

FIRST.

The defendant admits all of the allegations of the first paragraph of the Bill of Complaint.

SECOND.

The defendant admits all of the allegations of the second paragraph of the Bill of Complaint.

THIRD.

The defendant admits all of the allegations of the third paragraph of the Bill of Complaint except as herein denied or qualified; and the defendant denies:

That the Arkansas River in what is known as the Great Plains flows in a valley almost entirely of shifting sand, the slopes of which are scarcely distinguishable from the flat contours of the open prairie. But on the contrary avers that throughout the Plains country of eastern Colorado and western Kansas the said river has a well defined channel with bank from six to eight feet high; that the riparian land rises gradually in a series of benches called first and second bottom, all of which are alluvial and highly fertile under irrigation; that the general characteristics of said river and its valley, and the country adjoining, and the climatic conditions are practically uniform from the point where the river emerges from the Rocky Mountains to a point about two hundred miles east of the western border of Kansas.

That throughout the course of the Arkansas River as aforesaid, and as far east as the eastern line of Finney County, in the State of Kansas, the country is semi-arid, dry farming is unsuccessful and unprofitable, and irrigation is necessary to successful agriculture. That the rainfall increases very gradually from Pueblo to Dodge City.

The defendant admits that to a considerable extent the country along the Arkansas River and its tributaries in Colorado is dependent upon irrigation for agricultural prosperity, but denies the extent of such

dependence; denies the number of counties affected by the flow of the Arkansas River, and its tributaries; denies that the cities in said paragraph mentioned are wholly dependent for their prosperity on their supply of water from the Arkansas River, or its tributaries, and alleges that throughout the whole course of the Arkansas River in the territory above described there is a vast body of underground water commonly known as the underflow, fed by the melting rains and snows of the Rocky Mountains, and that the cities and towns along the river depend for their water supply for domestic purposes almost altogether upon water drawn by wells from this underflow.

Defendant further alleges that the cities of Trinidad and Pueblo are almost altogether dependent for their prosperity upon mineral resources and industries connected therewith but the defendant admits that from Pueblo eastward throughout the entire valley of the Arkansas River to the eastern line of Finney County, in Kansas, the country is largely dependent upon its agricultural resources, and largely upon irrigation.

Defendant further alleges that the prosperity built up in Colorado upon irrigation has been built up upon the unlawful diversion of the water of the Arkansas River as against the prior and superior right of this defendant as hereinafter described, contrary to law and in derogation, and in defiance of the comity between the States of Kansas and Colorado, and the well settled rules and decisions of this and the lower Federal Courts. That by reason of such unlawful diversion that part of the plains country in Colorado has pro-

gressed in wealth, and the western part of Kansas has correspondingly declined. That since May, 1901, when the case of *Kansas* v. *Colorado* commenced in this Court the citizens of Colorado, with the consent and assistance of the State of Colorado, have steadily and largely increased their diversions from the Arkansas River, and its tributaries; that since that date there have been new appropriations from the flow of the river and its tributaries either for direct irrigation or to be impounded in great reservoirs, a total of nearly 400,000 acre feet, and that since said date the amount of land irrigated from the Arkansas River and its tributaries has been increased by nearly fifty per cent, all to the detriment of this defendant and its appropriation in Kansas. That as a result there is now appropriated and diverted in Colorado by the State and its citizens all of the normal flow of the said river and its tributaries; all of the seasonal floods, and all the waters thereof except unusual and infrequent floods in the plains country of eastern Colorado.

FOURTH.

Defendant admits all of the allegations of the fourth paragraph of said Bill of Complaint except as herein denied, and defendant denies:

That the doctrine of riparian rights is controlling in the State of Kansas, but alleges that beginning in 1868 Kansas has recognized the right to take water from its streams for purposes of irrigation; has recognized priority of right by priority of appropriation; has authorized the construction of canals for irrigation;

condemnation of lands for that purpose; and formation of corporations, which statutes are copied in full in Appendix to the answer of the defendant, The State of Kansas, and are incorporated herein by reference.

That this defendant calls the Court's particular attention to the fact that by the second proviso of Section 1, chapter 58, of the Session Laws of Kansas effective March 4, 1876, before Colorado became a State, the State of Kansas adopted precisely the doctrine of prior appropriation which proviso is as follows:

> "Provided further, That it shall be unlawful for any corporation or person to locate or construct any irrigating canal along or upon any stream of water, or take and use the waters of any stream in such manner as to interfere with or in anywise hinder, delay or injure any milling or irrigating improvements already constructed or located along or upon any stream of water, or to diminish the supply of water flowing to or through any established irrigating canal."

FIFTH.

This defendant admits all the allegations of fact in the fifth paragraph except as herein denied:

This defendant is without knowledge upon which it can either admit or deny that the State of Colorado by its Constitution and laws, has treated all of the flowing water in the State as the property of the State itself, permitting its citizens to acquire only usufructuary rights subordinate to the State ownership, given for the time being to private agencies but subject and subservient to the dominant will of the State.

This defendant further avers that whatever may be the Constitution, laws, and administrative system of the State of Colorado that neither of them have any extratorial force or effect which is binding upon this defendant, or in any way invalidate or qualify its rights as hereinafter set forth.

This defendant denies that the State of Colorado owns all of the flowing water within the limits of that State, and especially the flowing water of the Arkansas River and its tributaries, because the same is an interstate stream and must be shared equitably between the citizens of Colorado and the citizens of Kansas of whom this defendant is one, and is thereby entitled to such an allotment of water as will fulfill and make effectual its rights hereinafter set forth.

SIXTH.

This defendant admits the allegations of fact of paragraph six of the Bill of Complaint but denies all of the conclusions of law therein set forth, and alleges that the said paragraph is made up almost entirely of a legal argument and citations of authorities which have no place in a Bill of Complaint, which this answering defendant will meet upon the final argument of this case when the facts are before the court.

This answering defendant further submits that this Court will take judicial knowledge of the Constitution and laws of the State of Colorado and will interpret the same in its final judgment.

SEVENTH.

As to the seventh paragraph of the Bill of Complaint this defendant admits the existence of the Stat-

utes of the State of Colorado, copies of which are filed herein, supplemental to the Complaint, under the rules of this Court.

This defendant admits that the State of Colorado by its laws, decisions, and administrative system is responsible for the diversion of the water from the Arkansas River and that unlawful deprivation of this defendant's right of prior appropriation on said river is partly due to the system established by Colorado and its persistent denial of this defendant's rights.

As to the citation of authorities, legal arguments and legal conclusions contained in this paragraph this defendant submits that it cannot properly at this time admit, deny or qualify them. That this defendant is prepared in due time to brief and argue this case; that all of such legal arguments and conclusions are out of place in this Bill of Complaint which should contain only allegations of fact, and this defendant repectfully prays that it may be excused from entering into a legal argument at this time.

EIGHTH.

This defendant admits the allegations in paragraph eight with regard to the institution of the suit of the *State of Kansas* v. *Colorado*, and the other defendants therein.

This defendant avers that it was not a party to said action; did not appear in person or by Counsel; had no control of the said litigation, and that its rights hereinafter set forth were not considered or determined in the said cause; that the said suit was brought on

behalf of all of the citizens of Kansas, and more particularly for those residing on or near the Arkansas River; that there was no claim of priority of irrigation rights for this defendant set up in the said cause; no testimony taken as to the priorities between this defendant and Colorado irrigators on the Arkansas River and its tributaries, and so no such issue adjudicated. That the State of Kansas did not bring this action on behalf of any particular citizens but for the whole mass of its citizens and for a particular class on the Arkansas River.

This defendant denies that it was decided in that case that the State of Kansas alone could sue to prevent the unlawful acts of the State of Colorado and its citizens; that no such issue was argued or decided by the Court; that the said decision was a final decree upon one single point to-wit, That the State of Colorado did not own the entire flow of the Arkansas River because the river and its tributaries originated in that State, but that under the comity between States along an interstate river the State of Kansas was entitled to an equitable share of the flow of said river. This defendant specifically denies that there are now any negotiations pending between the State of Colorado and the State of Kansas looking to a division of the flow of the Arkansas River between the two states, and alleges further that such negotiations were undertaken about the year 1923 but were broken off and terminated in 1926 because the Commissioners from the State of Kansas found it impossible to make any sort of an equitable Treaty with the State of Colorado, and that since 1926

there have been no such negotiations pending, contemplated, or even thought of.

The defendant further alleges that the decision in *Kansas* v. *Colorado*, whatever its legal effect, was as of date of the institution of said cause in May, 1901, and not as of the date of the final decree of 1907.

Defendant further alleges that the issues involved in the case of *Kansas* v. *Colorado* were between the States as a whole, that the suit was not brought for the Kansas irrigators, but was brought partly upon the underflow theory which this court did not admit, and for the benefit of all those living in the valley of the Arkansas River in Kansas. That no specific appropriations were alleged as to the Kansas ditches and no claim made for priority for these ditches and they were only alluded to as part of the damage to the interests of the people of the State of Kansas for whom the State is guardian. That in this action the State of Kansas is demanding an equitable allotment of the flow of the Arkansas River for the irrigators in Kansas according to their appropriations under the rule laid down in *Wyoming* v. *Colorado*.

NINTH.

This defendant answering the ninth paragraph of said complaint admits all the allegations of the same except as herein denied and denies:

That Colorado and its citizens "have continued the diversion and use of the waters of the Arkansas River to the extent that the same existed and were in actual use at the dates included within the issues and testimony in the above mentioned cause" but avers

that on the contrary, as alleged in the preceding paragraph, that the State of Colorado and its citizens have paid no attention to the said decision, or the limits there set out, or the principles established, but have, on the contrary, diverted the flow of said river as alleged in the preceding paragraphs, so that at the present time no water crosses the State line from Colorado to Kansas during the growing season except slight and intermittent flows from floods on the plains of eastern Colorado.

TENTH.

This defendant admits all of the allegations of the tenth paragraph in the Bill of Complaint except as herein denied:

The defendant says that it has no information as to the taxable value of the lands and property dependent upon the drainage of the Arkansas River, or whether the same has increased or decreased, but alleges that such facts, whatever they may be, are utterly irrelevant and immaterial herein, and have no bearing on this case.

The defendant, however, admits that under the authority of *Kansas* v. *Colorado*, and *Wyoming* v. *Colorado*, this court should and will allot the flow of the Arkansas River between Kansas and Colorado upon the basis of beneficial use, at some period of time to be fixed by this Court, but that this defendant claims both under such allotment if it be made, and independently of such allotment, and under its rights of priority asserted in the two cases in the United

States District Court for the District of Colorado, its right to two hundred and fifty second feet of the flow of the Arkansas River or its equivalent in acre feet during the growing season for its individual use as hereinafter prayed for.

ELEVENTH.

For its Answer to the eleventh paragraph of the complaint this defendant admits every allegation of the said paragraph except as herein denied:

This defendant denies that any suits have been brought by citizens of Kansas against citizens of Colorado in defiance of the principles laid down in the case of *Kansas* v. *Colorado*, but that the said suits have been brought by corporations and individuals of Kansas against corporations and individuals of Colorado to enforce a priority in Kansas as against irrigators in Colorado under the well settled adjudications of the Lower Federal Court, and this court, concerning the interstate rivers.

That all of said suits have been brought and maintained for individual priority rights, rights which were never considered, adjudicated or in any way touched upon in the case of *Kansas* v. *Colorado*.

The defendant denies that the State of Colorado was a necessary party to any of said suits or to the suits now pending brought by this defendant in the United States District Court of Colorado, and elsewhere described in the complaint, and alleges that they are purely private suits to establish private conflicting rights.

TWELFTH.

This defendant admits all the allegations of the twelfth paragraph of said complaint except as herein denied:

This defendant denies that as to the two suits brought by this defendant in the United States District Court of Colorado entitled, as set forth in the Bill of Complaint, as The Finney County Water Users Association vs. Graham Ditch Co., *et al.*, and The Finney County Water Users Association vs. Coler Ditch Company, *et al.*, that the rights therein set up and sought to be enforced were ever put in issue, considered, tried and adjudicated in the case of *Kansas v. Colorado*, but were asserted private rights against the asserted wrongs of Colorado defendants as distinguished from the public right of the State of Kansas against the public wrong of the State of Colorado.

This defendant denies that in either of the said last named cases it sought to deprive any municipality of its supply of water for domestic purposes. This defendant denies that any irrigator claiming a water right of any consequence either on the river itself or its tributaries was omitted in the said case; that before preparing and filing the said suits this defendant caused, at great expense a survey and examination of all of the water rights of the Arkansas River and its tributaries to be made by A. A. Wieland, a competent Engineer, and formerly State Engineer of Colorado, and that after an examination of all the records of adjudication of priority of water rights and claims on the said streams, and an investigation upon the ground,

said Wieland made to this defendant a complete and elaborate report, showing the date, amount and location of every appropriation claimed or adjudication upon said streams, and that the names of the defendants impleaded in the said causes were taken from the report, and that this defendant believes and affirms that the said report was full, complete and accurate, and that the defendants included in the said two suits are all the parties in interest upon the said streams whose appropriations or diversions are of such an extent or consequence to be considered in such litigation. That it has never been the intention of this defendant, in its said litigation, to contest the right to the use of the water of said streams for domestic purposes, and this defendant submits that the question of superfluous parties or absent parties, or as to the nature of the use of the water diverted and all kindred questions belonged to the jurisdiction of the United States District Court of Colorado.

Defendant alleges further that if in the said cases brought by this defendant now pending in the United States District Court of Colorado or in this case in this Court it should be found and adjudged that this defendant is entitled to a priority against all or part of the defendants named in the said local cases, such judgment would not disturb the system of Colorado, but would have simply the same force and effect as an adjudication made between appropriators by the courts of competent jurisdiction in Colorado, and would be enforced in the same manner without destruction or even disturbance to the administration of water rights in Colorado.

This defendant denies that if any portion of the flow of the Arkansas River is adjudicated to this defendant any other ditch in Kansas can seize or make any claim to it.

THIRTEENTH.

This defendant admits all the allegations of the thirteenth paragraph of said Complaint except as herein denied:

This defendant again denies that any of the rights of this defendant were included in or adjudicated by the decree in the case of *Kansas* v. *Colorado*, or that this defendant is in any wise bound by said adjudication, or that the same is *res adjudicata* as between this defendant and individual appropriators in the State of Kansas, or any other persons, and the State of Colorado.

FOURTEENTH.

This answering defendant is in doubt how to meet the fourteenth paragraph of the Bill of Complaint. There is in it no allegation of fact but mere conclusions and argument which have no place in a Complaint, but this defendant specifically denies that there is any defect of parties in the two cases pending in the United States District Court for Colorado, this defendant vs. The Graham Ditch Company, *et al.*, and this defendant against The Coler Ditch Co., *et al.*, and alleges that the case of the Graham Ditch Company, *et al.*, has been pending in that Court for twelve years; and the case against the Coler Ditch Company, *et al.*, has been pending for nearly seven years, and during all that

time the defendants therein have wholly failed to make any complaint of a defect of parties or that any injustice would be done to any of them by such defect.

This defendant further calls the attention of this Court to the fact that this Court has now taken jurisdiction of the entire matter of conflicting rights between Colorado and Kansas and their citizens. That in the answer to the Bill of Complaint filed herein by the State of Kansas the names of all irrigators, that to our knowledge have any interest in this controversy are placed before the Court with the prayer that they be notified of the pendency of this action, that the State of Colorado claims to be the proprietor of all of the water they are using for irrigation, and is guardian for their rights, and that they be notified, and if such is not the fact that they shall appear herein and set up their claims.

This defendant in this connection adopts by reference all of the allegations of letter (k) of paragraph 22 of the Answer of the defendant The State of Kansas herein as fully as though herein set out.

This defendant submits that the other allegations and conclusions of said paragraph were simply persuasive to this Court as supporting Complainant's prayer that this Court take jurisdiction of this entire matter and this Court having done so the objections contained in said paragraph become wholly irrelevant and immaterial to the cause in this Court.

FIFTEENTH.

This defendant has no information upon which it can either admit or deny the allegations of the fifteenth paragraph of the Complaint as to whether:

(a) The State of Colorado owns the Monument Reservoir in El Paso County, Colorado, diverting and storing water from Fountain Creek, a principal tributary of the Arkansas River, which is administered as a reservoir having a priority, the waters of which are distributed among appropriation owners on the stream below.

(b) Whether the State of Colorado has constructed and owns the Boss Lake Reservoir in Chaffee County, Colorado, diverting and storing water from Cottonwood Creek, Chalk Creek, and the South Arkansas River tributaries of the Arkansas River, which is administered as having a reservoir priority. The waters thereof being distributed among the appropriators in said streams.

(c) Whether in connection with the State Penitentiary at Canon City, Colorado, the State of Colorado owns and operates a farm and applies thereon water from the Arkansas River diverted through the "Canon City Hydraulic and Irrigating Ditch," and also uses water for irrigation purposes from the Arkansas River diverted through the municipal diversion system of the City of Canon City; also owns the "Canon Mill Ditch" used for power purposes from the Arkansas River.

(d) Whether in connection with the State Hospital for the Insane at Pueblo, the State of Colorado carries on considerable farming operations for the support and use of the said institution, diverting water through the "West Pueblo Ditch" under various usufructuary

rights assigned to the said Ditch on the Arkansas River, with priorities of various dates from 1872 to 1883.

(e) Whether in connection with the State Institution for the Deaf and Blind at Colorado Springs, Colorado, the State irrigates and uses for domestic purposes water diverted from tributaries of the Arkansas River through the diversion system of the City of Colorado Springs under usufructuary rights granted said city.

(f) Whether in connection with the State Reformatory located at Buena Vista, Colorado, the State of Colorado carries on extensive farming operations by irrigation from the Arkansas River and various tributaries, and is the owner of water rights under the Maynard Ditch, the Cotton Creek Irrigation Ditch, the Helena Ditch, and the Gold Nugget Ditch, and has under lease the benefit as lessee of extensive water rights from the Trout Creek Ditch, the Helena Ditch, the Bray Ditch, the Harmony Ditch, the Gold Nugget Ditch, and the Fish Ditch from the Arkansas River and its tributaries.

Defendant alleges that whatever may be the rights of the State of Colorado under these allegations that the said State has appeared in this case, submitted to its jurisdiction; that this Court has taken control of the said controversies and that the rights above alleged by the State of Colorado will be fully protected as they may appear to this Court.

SIXTEENTH.

This defendant says that it is without knowledge as to whether any negotiations are pending between the State of Colorado and states other than the State of Kansas looking to a Treaty concerning interstate rivers and avers that the same are wholly irrelevant and immaterial herein.

This defendant denies as heretofore that there are now or have been for three years last past any negotiations pending between the State of Colorado and the State of Kansas looking to any Treaty, such negotiations were definitely broken off in 1926.

SEVENTEENTH.

This defendant again denies that the State of Kansas has since 1868 had in force a strict riparian doctrine of the waters flowing within its borders, this has been completely covered under Paragraph 4 of this Answer.

Counsel for Complainant here and elsewhere have alluded to the case of *Clark* v. *Allaman*, 71 Kansas 206. The Supreme Court of Kansas in that case was misled by its failure to note and give effect to the Statute of 1868 and the Statute of 1876 (set forth in the appendix to the answer of the defendant, the State of Kansas, herein) and failed to note that in the same code of 1868 which adopted the common law for the State of Kansas, the right to form corporations for the purposes of irrigation, to dig canals, and use water for that purpose was fully recognized. The Supreme Court of Kansas particularly failed to take note of the doctrine of strict prior appropriations enacted in

March, 1876, which is set forth in full in the fourth paragraph of this Answer.

In other words the Supreme Court of the State of Kansas in the case of *Clark* v. *Allaman* failed to go back to the Statute of 1868, where the common law and the right to use water for irrigation were recognized in Kansas in the same year and in the same code. This failure of the Supreme Court of Kansas to note the earlier Statutes naturally led this Court into the error of stating in *Kansas* v. *Colorado* that Kansas had a different system from Colorado.

This defendant further answering said paragraph alleges that under the Statutes cited herein, and in the answer of the State of Kansas, this defendant acquired a vested right of prior appropriation which neither the Constitution, nor the laws of the State of Colorado, nor even the decision of this Court in *Kansas* v. *Colorado* can divest or destroy.

EIGHTEENTH.

The eighteenth paragraph of said Complaint is addressed solely to the question of whether this Court should take jurisdiction over this controversy, and this Court having done so the said paragraph is now of no consequence whatever.

NINETEENTH.

The nineteenth paragraph of the said Complaint contains no allegations of fact whatever but is simply a summing up and reiteration of the arguments previously set forth.

TWENTIETH.

As to the twentieth paragraph this defendant notes with pleasure that now after more than forty-eight years of trespass on the rights of this defendant and other irrigators in Kansas the State of Colorado is willing to do equity.

TWENTY-FIRST.

This defendant admits that a Court of Equity is the appropriate Tribunal to determine the rights involved in this controversy.

TWENTY-SECOND.

This defendant further answering and in support of its prayer for affirmative relief herein alleges:

(a) That in December, 1880, the predecessor in interest of this defendant, the Kansas Irrigation, Water Power & Manufacturing Company, a corporation duly organized under the laws of Kansas, duly completed the construction of an Irrigation Canal with its intake on the SE¼ of Section 12, Township 24, range 35, Kearny County, Kansas, and turned the water of the Arkansas River into the said Ditch and put the water thereof to beneficial use for purposes of irrigation and that the said canal has ever since been used for irrigation purposes continuously, without any break or interruption whenever water could be obtained from the Arkansas River.

(b) As originally constructed the Canal was sufficient to irrigate from fifteen to twenty thousand acres and is now capable of irrigating from eight to ten

thousand acres, some of the laterals having been abandoned for lack of water as herein set forth.

(c) That by mesne conveyances the title to said irrigation canal has passed to this defendant by deed from The Finney County Farmers Irrigation Association, dated August 27, 1906, and that this defendant is now the owner thereof.

(d) That this defendant is a corporation duly organized and existing under the laws of the State of Kansas, co-operative in its character. Each owner of the land along the ditch owns one share of the value of $1.00 in the Canal itself for each acre owned, the water right being appurtenant to and inseparable from the ownership of the land irrigated and that said Corporation is conducted as a co-operative Association for the purpose of furnishing water to its shareholders and not for profit. That the holdings under the Ditch are mostly small ranging from eighty to three hundred and twenty acres.

(e) That from the time the said canal was constructed and the water turned into it it was highly successful. At that time there was ample water in the Arkansas River to serve the said canal and all of the land under it, and the land along the ditch was rapidly taken up, broken out and put into cultivation; that then as now the rainfall in that country was not sufficient for profitable dry farming, but that under the ditch and by irrigation large crops of a general character were raised and irrigation was highly successful, and the irrigators prospered, the amount of ir-

rigated land and land under cultivation steadily increased until the diversion and depletion of the waters of the Arkansas River as hereinafter set forth reduced the supply of water to the said canal.

(f) That the said canal was the second irrigation canal constructed on the Arkansas River in Kansas, and had a capacity and an appropriation right of the date of December, 1880, of 250 second feet, and prior to all others except the Garden City Ditch, and prior to all of the irrigators in Colorado taking water from the Arkansas River and its tributaries of any consequence.

(g) That beginning about 1884 or 1885 the owners of land in Colorado along the Arkansas River began constructing canals and taking water out of the river, all the land along the river up to that time being solely a grazing and cattle country. These diversions were increased in number and magnitude continuously from year to year until about 1901 the entire normal flow of the river was diverted in Colorado and the owners of the canal of this defendant were entirely deprived of any water during the growing season except from seasonal floods. That all of the appropriators in Colorado were subsequent in time and inferior in right to the appropriation of this defendant's predecessor, and that all of said diversions were unlawful and in derogation to the right of this defendant and its predecessor in interest. That as a result of said unlawful diversions about the year 1898 or 1899 the Garden City Irrigation Company, then owning the said Ditch, became insolvent, the mortgage on it was fore-

closed, and the ditch sold by decree of the Federal Court of the United States Circuit Court for the State of Kansas, to the Security Company of Hartford, the mortgagee; that the said insolvency of said Company and the forced sale of this property was caused solely and entirely by the unlawful diversions in Colorado as aforesaid.

That about the year 1901 the irrigators in Colorado having diverted and absorbed all the normal flow of the river in the growing season began diverting the waters of the tributaries of the Arkansas in Colorado either by canals, or direct irrigation, or by enormous reservoirs intended to and which do impound all of the flood waters of the said tributaries, so that the seasonal floods which this defendant formerly received for its canal during the growing season have been almost entirely and completely diverted and either directly used or impounded by irrigators in Colorado. That since the year 1901 these diversions of the tributaries of the Arkansas River have amounted to nearly 400,000 acre feet and that during that period the irrigators in Colorado by reason of said diversions have been able to increase the acreage by irrigation in that State along the Arkansas River and its tributaries by more than fifty per cent and that each and every one of said appropriations and diversions are subsequent in time and inferior in right to the appropriation rights of this defendant.

(h) That as a result of said unlawful diversions, the irrigation right of your defendant, which would be of great value, has been practically destroyed. Irriga-

tion from its canal instead of being continuous and steady through the growing season has become uncertain and infrequent.

(i) That at the time the said canal was constructed as aforesaid and ever since the State of Kansas has recognized the right to use water for irrigation; that prior in time is prior in right, and that this defendant has a vested right of prior appropriation as aforesaid in the flow of the Arkansas River to the extent of TWO HUNDRED AND FIFTY second feet.

(j) That this defendant has no adequate remedy at law.

Wherefore this defendant prays that in any decree entered by this court herein that the priority of right of appropriation of this defendant as aforesaid be recognized and decreed as against the State of Colorado and all of its citizens diverting water from the Arkansas River and its tributaries in that State, that the State of Colorado, and its officers, and all other citizens of Colorado who shall be parties to this suit, be perpetually enjoined from diverting any water from the Arkansas River or its tributaries in Colorado until this defendant's right of 250 second feet, or so much thereof as may be necessary for its needs during the growing season shall be satisfied.

That the citizens of the State of Colorado who are diverting water from the Arkansas River and its tributaries named as defendants in the United States District Court for the District of Colorado in the cases of this defendant vs. The Graham Ditch Company,

et al., and this defendant vs. The Coler Ditch Company, *et al.*, whose names appear in division (k) of paragraph Twenty-two of the Answer of the defendant, the State of Kansas, herein received a warning notice of the pendency of this action and the assumption by said State of Colorado of guardianship of their interests and right to appear for them, and that if they object to such assumption of authority that they appear and make their objections known, or in the alternative if this Court shall find that the persons last above named are necessary parties that an order be entered to that effect and subpoenas be issued to them in due course, and for such other and further relief as may be conformable to equity and good conscience.

F. DUMONT SMITH,
LAWRENCE LEWIS,
CHESTER I. LONG,
Solicitors for the Defendant, The Finney County Water Users Association.

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. [redacted] Original [redacted] 9 [redacted] 6

THE STATE OF COLORADO, COMPLAINANT,

vs.

THE STATE OF KANSAS AND THE FINNEY COUNTY WATER USERS' ASSOCIATION, A CORPORATION, DEFENDANTS.

MOTION OF DEFENDANT, THE FINNEY COUNTY WATER USERS' ASSOCIATION, FOR LEAVE TO AMEND ITS ANSWER.

Comes now the defendant, THE FINNEY COUNTY WATER USERS' ASSOCIATION, and moves the Court for leave to amend its Separate Answer by striking therefrom the following words to-wit: On page 20, in the first and second lines of the twenty-second paragraph, strike out "And in support of its prayer for affirmative relief herein"; and to strike out of subdivision J

of the twenty-second paragraph, on page twenty-four of said answer, all of the prayer of the said answer beginning "WHEREFORE this defendant prays" down to and including the words "equity and good conscience" and to substitute in lieu thereof the following:

"WHEREFORE this defendant prays the consideration of this Court of the rights and equities of this defendant dependent upon and involved in the allegations of fact hereinbefore contained, and that in any decree made by this Court said rights and equities may be given such consideration as is conformable to equity and good conscience."

F. DUMONT SMITH,
LAWRENCE LEWIS,
CHESTER I. LONG,
Solicitors for The Finney County Water Users' Association, a Corporation.